Supreme Court, U.S.
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No. 01-651

IN THE

Supreme Court of the United States

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

EDWARD H. TILLINGHAST, III
COUDERT BROTHERS LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 626-4400

SARAH L. REID
Counsel of Record
JOSEPH N. FROEHLICH
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, New York 10178
(212) 808-7800

Attorneys for Petitioner

172420

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether corporations organized under the laws of the British Virgin Islands and other United Kingdom overseas territories are "citizens or subjects of a foreign state" for the purposes of alienage jurisdiction under 28 U.S.C. § 1332(a)(2)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioner The JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank, states that it is wholly-owned by J.P. Morgan Chase & Co., a publicly-owned company.

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The Per Curiam Opinion of the United States Court of Appeals for the Second Circuit in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 251 F.3d 334 (2d Cir. 2001) (Cert. App. 1a-7a).[1]

The Memorandum Opinion and Order of the United States District Court for the Southern District of New York in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 2000 WL 573232 (S.D.N.Y. May 8, 2000) (Cert. App. 8a-14a).

The Opinion and Order of the United States District Court for the Southern District of New York in *The Chase Manhattan Bank, as Indenture Trustee, under the Indenture, dated as of May 6, 1998 v. Traffic Stream (BVI) Infrastructure Limited* is reported at 86 F. Supp. 2d 244 (S.D.N.Y. 2000) (Cert. App. 15a-54a).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Second Circuit reversed the final judgment of the District Court for the Southern District of New York on May 24, 2001 (Cert. App. 1a-7a). On July 24, 2001, the United States Court of Appeals for the Second Circuit denied The JPMorgan Chase Bank's timely-filed petition for rehearing *en banc* (Cert. App.

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1. References hereinafter to "Cert. App. __" are to pages in the Appendix attached to the Petition for Writ of Certiorari.

55a-56a). The petition for a writ of certiorari was filed within 90 days from the date of the denial of the petition for rehearing *en banc* on October 18, 2001. 28 U.S.C. § 2101(c); SUP. CT. R. 13.3. Certiorari was granted on January 4, 2002.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1332(a):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of

> $75,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

STATEMENT OF THE CASE

In May 1998, Traffic Stream (BVI) Infrastructure Limited ("Traffic Stream"), a corporation organized under the laws of the British Virgin Islands (JA 8a, 40a),[2] raised $119,000,000 in the United States debt markets by entering into an Indenture, pursuant to which Traffic Stream issued its 14¼% Senior Secured Notes due 2006, to holders of the Notes. The JPMorgan Chase Bank ("Chase"), a corporation existing under and by the laws of the State of New York and

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2. References hereinafter to "JA __" are to pages in the Joint Appendix filed with the Supreme Court.

authorized to exercise trust powers, entered into the Indenture with Traffic Stream and agreed to serve as Trustee. (JA 8a). The Indenture states that "[Traffic Stream] irrevocably submits to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York, United States. . . ." (JA 85a).

Beginning in January 1999, Traffic Stream committed multiple "Events of Default", as defined in the Indenture, including the failure to pay the semi-annual interest payment due in May 1999. (JA 16a-20a). Chase commenced this action on June 4, 1999, in the United States District Court for the Southern District of New York, seeking, among other things, a turnover of certain funds in New York that were held as security by Chase, as Trustee, and a deficiency judgment. (JA 23a). Subject matter jurisdiction was based upon the alienage provisions of 28 U.S.C. § 1332. (JA 7a, ¶ 1). Traffic Stream, in its amended answer, admitted jurisdiction (JA 251a, ¶ 1) and admitted the Events of Default (JA 255a-256a, ¶¶ 22-31) but asserted that its obligation to pay any amount under the Indenture was excused based on the impossibility defense (JA 259a-261a, ¶¶ 53-64). Chase moved for summary judgment. (2d Cir. App. 196-242).[3]

Summary judgment was granted by the district court in an opinion and order dated January 31, 2000. *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 86 F. Supp. 2d 244 (S.D.N.Y. 2000) (Hon. Shira Scheindlin) (Cert. App. 15a-54a). The district court ordered Chase to foreclose on the collateral accounts, which exceeded

3. References hereinafter to "2d Cir. App. __" are to pages in the Joint Appendix which was filed in the Second Circuit Court of Appeals.

forty-seven million dollars, before submitting its proposed deficiency judgment. *Id.* at 262. The district court issued a second opinion on May 8, 2000, in order to resolve certain disputes about the appropriate deficiency judgment. *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, No. 99 Civ. 4056 (SAS), 2000 WL 573232 (S.D.N.Y. May 8, 2000) (Cert. App. 8a-14a).

Traffic Stream appealed to the Second Circuit, raising only the issues regarding the impossibility defense in its brief. At the oral argument before the Second Circuit on December 1, 2000, the panel raised *sua sponte* the issue of whether subject matter jurisdiction existed under 28 U.S.C. § 1332(a)(2) in light of the fact that the defendant Traffic Stream was incorporated in an United Kingdom Overseas Territory, namely the British Virgin Islands. The panel referred the parties to three recent cases in which the Second Circuit had found that residents and corporations from other United Kingdom Overseas Territories, namely Hong Kong (prior to its transfer to the People's Republic of China) and Bermuda, were not "citizens or subjects of a foreign state" for purposes of alienage jurisdiction.[4]

After the parties submitted supplemental briefing on this issue (JA 256a-269a, 277a-298a and Lodging), the Second Circuit, on May 24, 2001, held that there was no alienage jurisdiction for residents or corporations from the British Virgin Islands because such residents or entities were

4. The three cases were: *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998); *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended by* 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000); and *Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000).

"stateless" due to the fact that the United States does not regard the British Virgin Islands as an independent, sovereign political entity. (Cert. App. 1a-7a). The Second Circuit rejected the argument that the residents and corporations from the British Virgin Islands were citizens or subjects of the United Kingdom. The Second Circuit did not address materials that were submitted by Chase which demonstrated the United Kingdom's and the United States Department of State's positions that the residents and corporations from the United Kingdom Overseas Territories are citizens or subjects of the United Kingdom, and should be recognized as such for purposes of alienage jurisdiction. The Second Circuit also did not address the overruling of its 1996 decision in *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996), which had upheld alienage jurisdiction in a case involving a resident of the British Virgin Islands.

On June 7, 2001, Chase filed a petition for rehearing *en banc* with the Second Circuit. This petition was denied on July 24, 2001. (JA 6a, Cert. App. 55a-56a). Chase duly filed its petition for a writ of certiorari on October 18, 2001. On January 4, 2002, this Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

The Framers of the Constitution ("Framers") included provisions for alienage jurisdiction of federal courts in Article III of the Constitution and the original Judiciary Act of 1789 because of concern over issues of foreign policy and international trade.[5] In determining that foreign litigants

5. Alienage jurisdiction is distinct from ordinary diversity jurisdiction because alienage jurisdiction implicates issues of foreign relationships and international trade. *See* Kevin R. Johnson, *Why* (Cont'd)

should be entitled to bring suit in a neutral federal forum, the Framers had two overarching concerns: first, the prevention of foreign policy entanglements with foreign nations whose citizens believed themselves to have been unfairly treated by a biased state court; and, second, the promotion of foreign investment and trade in the fledgling republic. Over two hundred years later, these concerns are still valid, and indeed, for the past two centuries, the law surrounding alienage jurisdiction was uncontroversial.

This changed in 1997 when a divided panel of the Court of Appeals for the Second Circuit in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998), held that residents and corporations from Hong Kong, then an United Kingdom Overseas Territory,[6] were

(Cont'd)
Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens, 21 Yale J. Int'l L. 1, 4 (1996) ("alienage jurisdiction differs in salient respects from ordinary diversity jurisdiction"). Thus, even those who advocate the withdrawal of ordinary diversity jurisdiction have recognized the necessity of alienage jurisdiction. *See, e.g.*, Henry Friendly, *Federal Jurisdiction: A General View* 149-50 (1973); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv. L. Rev. 963, 966-68 (1979).

6. The United Kingdom Overseas Territories were formerly referred to as the British Dependent Territories. The United Kingdom Overseas Territories presently include Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Sovereign Base Areas in Cyprus, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, Saint Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, dated November 21, 2001, at 2 n.2.

"stateless", and, thus, not subject to alienage jurisdiction under 28 U.S.C. § 1332(a)(2). In making its ruling, the Second Circuit sought to determine whether, under the law of the United Kingdom, a resident corporation from Hong Kong was a citizen or subject of the United Kingdom. Focusing on only two British statutes (the British Companies Act 1948 and the British Nationality Act 1981), the *Matimak* court concluded that a Hong Kong corporation was not a citizen or subject of the United Kingdom, and, thus, was stateless because Hong Kong was not recognized as a sovereign state by the United States. The *Matimak* decision was severely criticized.[7] However, in spring 2000, the Second Circuit extended *Matimak* when it dismissed claims in two cases involving Bermuda corporations and Bermuda individuals, citing *Matimak* as controlling authority. *See Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended by* 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000); *Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000). This case follows.

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7. *See, e.g.*, Jonathan Shafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 Colum. J. Transnat'l L. 729 (2001); Frank Eric Marchetti, *Alienage Jurisdiction Over Stateless Corporations: Revealing the Folly of Matimak Trading Company v. Khalily*, 36 San Diego L. Rev. 249 (1999); Jennifer L. Coviello, *Access Denied: A Case Comment on Matimak Trading Co. v. Khalily*, 18 N.Y.L. Sch. J. Int'l & Comp. L. 435 (1999); Mark Baker, *Lost in the Judicial Wilderness: The Stateless Corporation after Matimak Trading*, 19 Nw. J. Int'l L. & Bus. 130 (1998); Teresa M. Mozina, *Why Is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of Matimak Trading Co. v. Khalily and D.A.Y.*, 10 Pace Int'l L. Rev. 575 (1998).

As the United Kingdom clearly demonstrates in its *amicus* brief, the *Matimak* court, which did not have the benefit of any briefing by the United Kingdom, misinterpreted that country's law and therefore erred in its holding that there was no legal relationship between the United Kingdom and the residents and corporations of its overseas territories. In extending the *Matimak* decision to residents and corporations of the British Virgin Islands, the Second Circuit ignored the numerous indicia which demonstrate that residents and corporations of those islands are indeed under the sovereignty of the United Kingdom. In doing so, the Second Circuit refused to extend any deference to the position of the Executive Branch which recognizes that the United Kingdom exercises sovereignty over the British Virgin Islands.

The *Matimak* decision, in its implementation, violates the Framers' intent. It creates a clear entanglement with the United States' closest ally, the United Kingdom, which has issued two Diplomatic Notes protesting the Second Circuit's decisions. The failure to provide comity and deference to the United Kingdom's own determination of its subjects has caused difficulties for the United States government. The failure by the judicial branch of the United States government to defer to the Department of State in a matter involving recognition of the United Kingdom's sovereignty over the British Virgin Islands is equally troubling. Finally, the *Matimak* line of cases adversely impacts international trade with residents and corporations from United Kingdom Overseas Territories, many of which have become centers for substantial capital markets and other financial transactions involving literally billions of U.S. dollars. The Second Circuit's decision has a profound impact on thousands of British Virgin Islands companies which have incorporated

under the International Business Companies Act to transact business exclusively outside the British Virgin Islands and have raised capital in the capital markets of the United States, as well as on such companies' creditors. Under all these circumstances, the decision of the Second Circuit should be reversed and alienage jurisdiction upheld.

ARGUMENT

I.

THE HISTORICAL BASIS FOR ALIENAGE JURISDICTION AND THE FRAMERS' INTENT TO ENSURE ALIENS ACCESS TO THE FEDERAL COURTS CONFIRM THE PROPRIETY OF ALIENAGE JURISDICTION IN THIS CASE

Matimak (and the subsequent extension of *Matimak* to this case) vitiates the very reasons the Framers made specific provision for alienage jurisdiction in the Constitution and the original Judiciary Act of 1789. After the Revolutionary War and prior to the adoption of the Constitution, the state courts, fueled by a mixture of anti-British and anti-creditor sentiment, made it difficult for British creditors to collect debts from local debtors. *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 6 (1996). Alienage jurisdiction was seen as a means of addressing this problem by providing foreign litigants with a neutral federal forum. *See id.* Thus, the Constitution specifically provided that "[t]he judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2. The writings of the Framers demonstrate that two predominant reasons were the basis for alienage jurisdiction.

The first of these reasons was to prevent entanglements with foreign governments that became aggrieved when their citizens were unfairly treated by a less-than-neutral state court either as plaintiff or defendant.[8] Alexander Hamilton set forth this concern in *The Federalist No. 80*:

> [T]he peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquility. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the

8. This was especially fitting for the young republic, which found that the state courts' refusal to allow private British creditors to collect on their debts made it difficult for the new nation to meet its obligations under the Treaty of Paris of 1783. *See* Johnson, *supra*, at 8; Marchetti, *supra*, at 255.

> stipulations in a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The Federalist No. 80, at 476-77 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This foreign relations aspect of alienage jurisdiction is set forth not only in *The Federalist*, but also in the writings of several of the other Framers.

> [T]here is a particular & very cogent reason for securing to *foreigners* a trial . . . in a *federal* court. With respect to *foreigners*, all the states form but *one nation*. This *nation* is responsible for the conduct of all its members towards foreign nations, their citizens & subjects; and therefore ought to possess the power of doing justice to the latter. Without this power, a single state, or one of its citizens, might embroil the whole union in a foreign war.

Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 *The Documentary History of the Ratification of the Constitution* 204 (1983).[9]

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9. *See also* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 158-59 (Jonathan Elliot ed., 1888) (Comments of William Davie of North Carolina); 3 *id.* at 533-34 (Comments of James Madison of Virginia); 2 *id.* at 492-93 (Comments of James Wilson of Pennsylvania).

The second of the major purposes behind alienage jurisdiction was to promote foreign investment in and trade with the fledgling republic. The Framers recognized that the ill treatment of foreigners who sued or were sued in the state courts could discourage foreign investment. James Madison, in particular, noted this aspect of the need for alienage jurisdiction: "We well know, sir, that foreigners cannot get justice done them in [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 Elliot, *supra*, at 583. Such a concern was a clear priority as the United States, at that time, was in an economic crisis largely due to a monetary shortage. E.A.J. Johnson, *The Foundations of American Economic Freedom: Government and Enterprise in the Age of Washington* 123 (1973); Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 Okla. City U. L. Rev. 547, 558 (1989) ("[T]he new nation teetered on the brink of economic disaster."); *see also* Jonathan Shafter, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 Colum. J. Transnat'l L. 729, 745-47 (2001) (asserting that the economic reasons for alienage jurisdiction were as important to the Framers as the foreign policy reasons).

Moreover, Congress codified this grant of alienage jurisdiction in Section 11 of the Judiciary Act of 1789, which provided for federal court jurisdiction in cases in which "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Apparently the Framers of the Constitution and drafters of this first Judiciary Act used the terms foreigners and aliens interchangeably when referring to non-United States citizens or subjects. *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 416 (3d Cir. 1999).

In 1875, Congress amended the alienage jurisdiction provisions by replacing the term "alien" with the current "citizens or subjects" language. This change, however, was not made in order to narrow the meaning of "alien", but rather was intended to have the statute mirror the Constitution in order to make it clear that the federal courts did not have jurisdiction over disputes between aliens. *See* Johnson, *supra*, at 21. "[T]he drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." *Koehler*, 229 F.3d at 191 (Sotomayor, J., dissenting) (citing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.)).

As set forth hereafter at Point III, the Second Circuit's holding in this case, that the residents and corporations from the British Virgin Islands are "stateless" and unable to participate in a federal forum under the alienage jurisdiction provisions, completely undercuts the express intent of the Framers to prevent foreign entanglements and to promote trade. By narrowing the scope of the terms "citizens" and "subjects", the Second Circuit also contradicts the Framers' intention and understanding that alienage jurisdiction broadly encompassed all those who were under the authority of a foreign power. In doing so, the Second Circuit has declared literally millions of individuals and corporations around the world to be "stateless", a situation which would have been incomprehensible to the Framers.

II.

THE MATIMAK DECISION IS BASED ON AN INCORRECT INTERPRETATION OF THE LAW OF THE UNITED STATES AND THE UNITED KINGDOM AND SHOULD BE REVERSED

In 1997, after two centuries of alienage jurisprudence,[10] a divided panel of the Court of Appeals for the Second Circuit in *Matimak Trading Co. v. Khalily* held in a case involving a Hong Kong corporation that residents and corporations from the United Kingdom Overseas Territories were "stateless", and, thus, not subject to alienage jurisdiction under 28 U.S.C. § 1332(a)(2). 118 F.3d at 88. Judge Altimari, in a strongly worded dissent, concluded that Hong Kong, like the other United Kingdom Overseas Territories, was "inexorably linked" to the United Kingdom and, thus, its residents should

10. The Second Circuit, in *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 45 n.4 (2d Cir. 1996), upheld jurisdiction in an action between a New York corporation and a British Virgin Islands corporation. The sudden change in *Matimak*, just a year later, was not precipitated by a change in the Judiciary Act or the legal status of United Kingdom Overseas Territory residents by the United Kingdom. Instead, this change was simply a change in interpretation — an interpretation with which all other circuits deciding this issue have disagreed (*see, e.g., Southern Cross Overseas Agencies*, 181 F.3d at 417-19; *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998)), and indeed many members of the Second Circuit judiciary disagree (*see, e.g., Matimak*, 118 F.3d at 89 (Altimari, J. dissenting); *Koehler*, 229 F.3d at 187 (Judges Sotomayor, Leval and Calabresi dissenting); *Koehler*, 229 F.3d at 424-25 (Judges Cardamone and Newman stating that were the question open, they "would rule that citizens of Bermuda and other British Dependant territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause").

be considered "citizens or subjects" of the United Kingdom for alienage jurisdiction purposes. *Id.* at 91-92.

Underlying the majority decision in *Matimak* was a willingness to broadly apply the concept of "statelessness" to foreign corporations, which was not well supported in the law. While asserting that the "notion of statelessness is now well embedded in international law", the *Matimak* court then cited to six cases that only raised "statelessness" issues for individuals. *Id.* at 86, 87. None of these cases involved corporations.[11] The reason for this is simple: as Judge Altimari wrote in his dissent, "[a] stateless corporation is an oxymoron." *Id.* at 89. The majority in *Matimak* failed to acknowledge that corporations are creations of law and, accordingly, failed to correctly analyze the indicia that pertain to a corporation. As Judge Sotomayer noted in her dissent in *Koehler*, "In such cases, when our Department of State determines that a country is not a sovereign state, the more

11. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1089-90 (9th Cir. 1983) (involving individual who had his Soviet Union citizenship revoked); *Sadat v. Mertes*, 615 F.2d 1176, 1178-1181 (7th Cir. 1980) (holding a United States naturalized citizen who claimed dual citizenship and who was living abroad at the time of the suit could not invoke alienage jurisdiction); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) (in an Eleventh Amendment case, court noted that members of Native American tribes are not state citizens because of the Federal Indian Law of 1972); *Shoemaker v. Malaxa*, 241 F.2d 129, 129 (2d Cir. 1957) (involving individual who had his Romanian citizenship revoked); *Ligi v. Regnery Gateway, Inc.*, 689 F. Supp. 159, 161-62 (E.D.N.Y. 1988) (involving issue of whether Romanian individual properly revoked his citizenship, jurisdiction upheld); *RCA Records v. Hanks*, 548 F. Supp. 979, 982 (S.D.N.Y. 1982) (involving issue of whether individual from the Netherlands had revoked his citizenship, jurisdiction upheld).

reasonable conclusion is not that its corporations are "stateless," but rather that they are subject to some other sovereign." 229 F.3d at 193. By extending "statelessness" concepts for individuals to corporations, the *Matimak* court's reasoning was flawed from the outset.

The Second Circuit's analysis in *Matimak* began with the principle that the term "foreign state" in 28 U.S.C. § 1332(a)(2) refers only to nations formally recognized by the executive branch. *Matimak*, 118 F.3d at 79. Since Hong Kong was a British Overseas Territory that was not recognized by the Executive Branch as a "foreign state" unto itself, the Second Circuit concluded that alienage jurisdiction could not be invoked by a "citizen or subject" of Hong Kong.[12] *Id.* at 82-83. The Second Circuit then analyzed whether a corporation or resident of Hong Kong was a "citizen or subject" of the United Kingdom. After first stating that "[w]e begin with the truism that a foreign state is entitled to define who are its citizens and subjects", the *Matimak* court then tried to determine whether the United Kingdom considered residents and corporations from its territories as citizens. *Id.* at 85. Looking at two British statutes, the British Companies Act 1948 and the British Nationality Act 1981, the *Matimak* court concluded that residents and corporations from the United Kingdom's Overseas Territories were not citizens or subjects of the United Kingdom, and, thus, were stateless. *Id.* at 85-86. As the United Kingdom has authoritatively pointed out in its subsequent filings and in the

12. The *Matimak* case concerned a citizen of Hong Kong, which in 1996 was an United Kingdom Overseas Territory. In a case brought in 1999, after Hong Kong became a Special Administrative Region of the People's Republic of China (the "PRC"), the district court held that a Hong Kong citizen could now sue or be sued in federal court as a citizen of the PRC. *Favour Mind Ltd. v. Pacific Shores, Inc.*, No. 98 Civ. 7038(SAS), 1999 WL 1115217 at *6-7 (S.D.N.Y. Dec. 7, 1999).

brief it is filing on this appeal, the *Matimak* court misinterpreted the law of the United Kingdom and improperly applied the British Companies Act 1948 and the British Nationality Act 1981. (*See* L 16-19).[13] Equally important, however, the court failed to recognize that the United States had repeatedly recognized the United Kingdom as having sovereignty over its Overseas Territories. By failing to look first to the position of the United States and the Department of State before attempting an analysis of United Kingdom law, the court was led into error which was compounded by its misreading of United Kingdom law.

The *Matimak* court regarded a company incorporated under the British Companies Act 1948 (which the *Matimak* court failed to recognize was replaced by the Companies Act 1985) as the paradigm British company for purposes of alienage jurisdiction. Such an interpretation, however, is wrong. The Companies Act that the *Matimak* court focused on only covered certain law districts of the United Kingdom. The United Kingdom, as an international entity, is composed of multiple law districts. These districts, most of which have their own Companies legislation, not only include England, Wales and Scotland (the areas for which the Companies Act 1985 applies), but also Northern Ireland, each of the Overseas Territories and each of the Crown Dependencies.[14]

13. References hereinafter to "L __" are to pages in the Lodging filed with the Supreme Court.

14. The United Kingdom has explained the concept of law districts:

> The United Kingdom consists of a number of law districts for the purpose of conflict of laws. The metropolitan

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(L 12, 17-18). The *Matimak* court improperly elevated the companies legislation of one law district over that of another, rather as if a foreign court were to find a corporation could only properly be called a United States corporation if it were incorporated in Delaware and not in another state. Under the *Matimak* court's reasoning, companies from Northern Ireland would also be "stateless" because they are not formed under the British Companies Act 1948 (now 1985) but rather under the company law of Northern Ireland in the Companies (Northern Ireland) Order 1986, No. 1032, ch. 6 (N. Ir.). Of course, such a result is clearly contrary to the United Kingdom's exercise of sovereignty over such companies. The *Matimak* court's reliance on the British Companies Act 1948 was, thus, erroneous and misplaced.

Equally misplaced was the *Matimak* court's reliance on the British Nationality Act 1981. Although the *Matimak* court recognized that this act "applies only to natural persons, not corporations", it went on to hold that the Nationality Act "distinguishes between citizens of the United Kingdom and

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> United Kingdom consists of three separate law districts: England and Wales, Scotland, and Northern Ireland. The Overseas Territories and Crown Dependencies are each separate law districts. As such, they are entitled to enact their own laws in accordance with their constitutions. These separate law districts have separate laws, but they all belong to one State: the United Kingdom. It follows that, in international law, the United Kingdom Overseas Territories are not independent States, but are parts of the United Kingdom, and are subject to United Kingdom sovereignty.

(L 12).

citizens of 'British Dependant Territories'." *Matimak*, 118 F.3d at 86. As the United Kingdom has repeatedly pointed out, such a conclusion is wrong. (L 18).

The United Kingdom recognizes six categories of nationality under the British Nationality Act 1981. However, every one of those categories is entitled to the protection of the United Kingdom in the international forum. *See* United Kingdom Government's Diplomatic Service Procedure Manual, Vol. 7, Annex 1, § 2 (Mar. 1996) [hereinafter "United Kingdom Diplomatic Service Procedure Manual"] (located at L 31). There is no such category as "citizen of the United Kingdom", and the *Matimak* court's reference to such is simply wrong. For purposes of consular protection and international claims, the United Kingdom has defined the term "United Kingdom national," which includes the citizens of the United Kingdom Overseas Territories. *Id.*

The fact that one category of nationality provides the right to live in the "metropolitan United Kingdom" (England, Wales, Scotland and Northern Ireland) or in an Overseas Territory while another does not is a matter of United Kingdom immigration policy. Alienage jurisdiction should not turn on categorization or terminology adopted and amended by the United Kingdom. Instead, the *Matimak* court should have looked to the plethora of indicia that show that residents and corporations from the United Kingdom Overseas Territories are under the sovereignty and protection of the United Kingdom, and, thus, should be considered "citizens or subjects" for alienage jurisdiction purposes.[15]

15. The Court is respectfully referred to the *amicus curiae* brief of the Government of the United Kingdom of Great Britain and Northern Ireland filed herein for a complete and authoritative discussion of these indicia.

There is vast evidence that the United Kingdom is internationally responsible for the residents and corporations from its overseas territories and that such residents and corporations are subject to United Kingdom sovereignty. For example, under the United Kingdom Government's Diplomatic Service Procedure Manual, the term "United Kingdom national" is defined to include "British Dependent Territories Citizens" and "[c]ompanies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible." United Kingdom Diplomatic Service Procedure Manual, *supra*, § 2, Rule 1(a)(2) and 1(b) (located at L 31). Further, in the Consular Convention between the United States and the United Kingdom, the term "nationals", as it regards the United Kingdom, is defined to include "all juridical entities duly created under the law of any of [the Overseas T]erritories." Consular Convention between United States and the United Kingdom, June 6, 1951, at Art. 2, § 4(a), 3 U.S.T. 3426.

The fact that the United Kingdom considers the residents and corporations from its territories as its "nationals" (and that the United States recognizes such in the Consular Convention) should be no surprise when one considers the relationship between the British Virgin Islands and United Kingdom. The Constitution of the British Virgin Islands recognizes that the United Kingdom continues to have sovereignty over that Overseas Territory. *See* Virgin Islands (Constitution) Order 1976, No. 2145, § 71 [hereinafter "BVI Const."] ("There is reserved to Her Majesty full power to make laws for the peace, order and good government of the Virgin Islands.").[16] The Governor of

16. The British Virgin Islands (Constitution) Order 1976 is reprinted in *Constitutions of Dependencies and Special Sovereignties* (Blaustein ed., 1997).

the British Virgin Islands, who is appointed by the Queen, is responsible for core government functions including internal security, public service and court administration. (L 20; *see also* BVI Const., *supra*, §§ 3-6, 19). Similarly, any bill passed by the Legislative Council of the British Virgin Islands must be approved by the Governor and the Queen, with such procedure including a careful review by the United Kingdom's Foreign and Commonwealth Office.[17] (L 20-21; *see also* BVI Const., *supra*, § 42). In fact, the members of the Legislative Council must swear or affirm their allegiance to the Crown prior to taking part in any of the Council's proceedings. BVI Const., *supra*, § 36.

In the area of law, the final appeal from the courts of the British Virgin Islands is to the Judicial Committee of the Privy Council, which is comprised of members of the House of Lords and senior judges of the United Kingdom and the Commonwealth. Virgin Islands (Appeals to Privy Council Order) 1967 (S.I. 1967 No. 234), *as amended by* the Anguilla, Montserrat, and Virgin Islands (Supreme Court) Order 1983 (S.I. 1983 No. 1108), Article 3; *see also Privy Council Office: Judicial Committee*, *at* http://www.privy-council.org.uk/judicialcommittee/index.htm (last visited Feb. 14, 2002). In addition, barristers who are called to the English, Scottish and Northern Ireland Bar, as well as solicitors, may practice law in the British Virgin Islands provided that they submit proof of their training and pay a fee. *See* West Indies

17. The oversight of the laws passed by the Legislative Council of the British Virgin Islands is not unique among the United Kingdom Overseas Territories. Judge Sotomayor, in her dissent from the denial of a rehearing *en banc* in the *Koehler* case, stated: "All authority to make laws for the 'peace, order, welfare and good government' of Bermuda is granted to the Bermuda legislature solely by the United Kingdom, which regulates Bermuda lawmaking." 229 F.3d at 192.

Associated States Supreme Court Act, Chapter 80, § 68 of the laws of the British Virgin Islands.

It is also clear that the United Kingdom controls the foreign policy of the Overseas Territories. The United Kingdom not only provides for the Overseas Territories' military defense, but also acts on their behalf in regards to foreign diplomatic relations.[18] In addition, the United Kingdom not only negotiates international treaties on behalf of the British Virgin Islands, but also executes them on behalf of the British Virgin Islands.[19] *See, e.g.*, United Kingdom of Great Britain and Northern Ireland (on Behalf of the British Virgin Islands) and the United States of America: Exchange of Letters Constituting a Narcotics Cooperation Agreement with Respect to the British Virgin Islands, April 14, 1987, 1681 U.N.T.S. 28491.

The British Virgin Islands are similarly bound by treaties to which the United Kingdom is a party and which the United Kingdom has extended to the British Virgin Islands. For example, the United Kingdom recently exercised its sovereign authority over the Overseas Territories when the

18. *See, e.g.*, Central Intelligence Agency, *The World Factbook: British Virgin Islands* (2001), *available at* http:/www.cia.gov/cia/publications/factbook/geos/vi.html (listing Diplomatic Representation as "none (overseas territory of UK)" and Military as "defense is the responsibility of the UK").

19. The oversight of foreign policy interests of the British Virgin Islands is not unique among the United Kingdom Overseas Territories. In *Wilson v. Humphrey's (Cayman) Limited* the Seventh Circuit, in holding that alienage jurisdiction applied to a company from the Cayman Islands, stated that "[t]he United Kingdom represents Caymanian diplomatic interests and is responsible for its military defense." 916 F.2d at 1242.

Queen in Council overrode local legislatures and amended the laws of certain United Kingdom Overseas Territories (including the British Virgin Islands) to fulfill the United Kingdom's obligations under the European Convention on Human Rights and the United Nations International Covenant on Civil and Political Rights. Associated Press, *The British Government Decriminalizes Homosexuality in Caribbean Territories* (January 5, 2001).

The British Virgin Islands has stated that its citizens and corporations are subject to the sovereignty of the United Kingdom. The Attorney General for the British Virgin Islands, Cherno S. Jallow, issued a statement, dated February 3, 2000, that fully supports the conclusion that residents and corporations of the British Virgin Islands are subjects of the United Kingdom. (*See* L 35-36 ("On behalf of the Government of the British Virgin Islands, I fully support the arguments and conclusions presented in the Brief of the United Kingdom.")). In this instance, where the three relevant entities (the United Kingdom, the British Virgin Islands and the United States) all have opined that the residents of the British Virgin Islands are subjects of the United Kingdom, there can be no reasoned argument which would allow a court to reach a different conclusion. *See Favour Mind Ltd.*, 1999 WL 1115217 at *6-7 & n.12 (holding that corporations from post-reversion Hong Kong were subjects of the PRC based on the uniform positions of the PRC, Hong Kong Special Administrative Region and the United States). As the Third Circuit wrote in upholding alienage jurisdiction over a Hong Kong corporation post-*Matimak*, "[w]e do not believe that executive authority in foreign policy matters is limited to the definition of "foreign state" for § 1332 purposes. Executive competence also extends to the definition of "citizens or subjects," at a minimum in cases where the proper interpretation is unclear and the outcome may affect our foreign policy." *Southern Cross Overseas Agencies*, 181 F.3d at 418.

III.

THE NEGATIVE EFFECTS OF MATIMAK ARE CLEAR AND MANDATE REVERSAL IN THIS CASE

A. The Matimak Line of Cases Has Led to a Foreign Entanglement with the United Kingdom and Could Cause Entanglements With Other Allies

The Second Circuit's opinion in *Matimak* and its extension to other cases involving other residents and corporations from the United Kingdom Overseas Territories[20]

20. The courts of the Second Circuit have extended *Matimak* to other United Kingdom Overseas Territories on at least nine occasions including this one. *See, e.g.*, *Koehler*, 209 F.3d at 139 (dismissing action against Bermuda defendants); *Universal Reinsurance Co., Ltd.*, 224 F.3d at 141 (holding there would be no alienage jurisdiction for a domiciliary of Bermuda); *General Star Indem. Co. v. Platinum Indem. Ltd. Bank of Am.*, No. 00 Civ. 4960(LMM), 2001 WL 40763 at *1-2 (S.D.N.Y. Jan. 17, 2001) (holding that there was no subject matter jurisdiction because the defendant is a Bermuda corporation); *New Heaven Properties Ltd. v. Grinberg*, No. 99 Civ. 11546 (LMM), 2000 WL 64842 at *1-3 (S.D.N.Y. Jan. 26, 2000) (dismissing a British Virgin Islands corporation's complaint); *III Fin. Ltd. v. Aegis Consumer Funding Group, Inc.*, No. 99 Civ. 2579(DC), 1999 WL 1080371 at *3-4 (S.D.N.Y. Nov. 30, 1999) (granting defendant's motion to dismiss because the plaintiff was a Cayman Islands corporation); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124(JGK), 1999 WL 307666 at *3-4 (S.D.N.Y. May 17, 1999) (dismissing action against a Cayman Islands defendant), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Lucky Yeh Int'l, Ltd. v. Happiness Express, Inc.*, No. 96 Civ. 3365(SJ), 1999 WL 147095 at *3 (E.D.N.Y. March 12, 1999) (dismissing Hong Kong corporation's complaint); *Klein v. Marriott Int'l., Inc.*, 34 F. Supp. 2d 176, 178-80 (S.D.N.Y. 1999) (dismissing complaint against Bermuda defendant).

has created an entanglement with one of the United States' greatest allies, the United Kingdom. The irony of this situation was not lost on Judge Sotomayor in her dissent from the Second Circuit's refusal to consider the *Matimak* issue *en banc*:

> Paradoxically, the country we offend by these holdings is not only a strong ally, but the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago when they sought to open the federal courts to foreign litigants.

Koehler, 229 F.3d at 188-89 (Sotomayor, J., dissenting). Indeed, the United States appears as *amicus curiae* in this matter because of the seriousness of the issues raised by the *Matimak* holding.

Since *Matimak*, the United Kingdom has issued two separate Diplomatic Notes that expressed its "concern about a number of judicial decisions which have denied corporations of United Kingdom Overseas Territories access to United States Federal Courts." *See* Diplomatic Note No. 13/2000 from the British Embassy in Washington, D.C. to the United States State Department, Feb. 2, 2000 at 1 (located at L 29-30) [hereinafter "Feb. 2000 Diplomatic Note"]; Diplomatic Note No. 90/2001 from the British Embassy in Washington, D.C. to the United States State Department, Oct. 5, 2001 at 1 (attached as Appendix A to the Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, dated November 21, 2001) [hereinafter "Oct. 2001 Diplomatic Note"]. The Feb. 2000 Diplomatic Note specifically stated: "The United Kingdom . . . views with great concern the potential application of the Matimak

rationale to individual Overseas Territories residents, as well as to commercial enterprises."[21] Feb. 2000 Diplomatic Note, *supra*, at 1.

The United Kingdom, in the two Diplomatic Notes, raises substantial issues of international comity and reciprocity. Both Diplomatic Notes state:

> The United Kingdom notes that all corporations validly incorporated under the laws of the United States and its territories are entitled to sue and be sued in the courts of the United Kingdom and its Overseas Territories. As a matter of international comity and reciprocity, the United Kingdom considers that United States Federal Courts should be open to corporations established in United Kingdom Overseas Territories.

See Feb. 2000 Diplomatic Note, *supra*, at 1; Oct. 2001 Diplomatic Note, *supra*, at 2. In this instance, the United

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21. The United Kingdom has proven that it takes this issue very seriously by submitting briefs to various courts that have addressed this issue, asserting that the residents and corporations of the United Kingdom Overseas Territories are its "citizens or subjects". Besides its submission to this Court of *amicus* briefs in support of Chase (at both the petition for a writ of certiorari stage and on the merits), the United Kingdom has also submitted *amicus* briefs in the following matters: (1) in support of a petition for a writ of certiorari to the Supreme Court in *Matimak*; (2) in support of the plaintiff's opposition to a motion to dismiss in the matter captioned *III Finance Ltd. v. Aegis Consumer Funding Group, Inc.*, No. 99 Civ. 2579 (DC) (S.D.N.Y.) (decision reported at 1999 WL 1080371 (S.D.N.Y. Nov. 30, 1999)), and (3) in support of appellant in the matter captioned *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir.) (affirmance reported at 212 F.3d 596 (5th Cir. 2000)) (*see* L 1-36).

Kingdom has clearly explained the proper interpretation of its law regarding companies and nationality.[22] *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in support of Petitioner, dated February 19, 2002. Deference should be given to a foreign land that provides a court of the United States with an interpretation of its own law. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490 (D.N.J. 1999). This is especially true in matters where a foreign nation has defined its own citizens and subjects. *See United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898). ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."); *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 285 (7th Cir. 1991) ("Generally accepted test for determining whether a person is a foreign citizen for purposes of 28 U.S.C. § 1332(a)(2) is whether the country in which citizenship is claimed would so recognize him.").

The United States Department of State has also made multiple submissions to various courts, urging that the

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22. The Oct. 2001 Diplomatic Note states:

> The United Kingdom believes that *Matimak* was wrongly decided, primarily because it was based on an incorrect interpretation of United Kingdom company and nationality law, as well as on a misapprehension of the constitutional relationship between the United Kingdom and its Overseas Territories.

Oct. 2001 Diplomatic Note, *supra*, at 1.

residents of the United Kingdom Overseas Territories be treated as citizens or subjects of the United Kingdom for purposes of alienage jurisdiction.[23] In this instance, where issues of foreign policy are involved, courts should "take heed of the State Department's position." *Southern Cross Overseas Agencies*, 181 F.3d at 418 ("Just as the executive is best positioned to make the determination that recognition of a sovereign is appropriate, the executive is best situated to conclude that Hong Kong was, at the time suit was filed, so closely connected to the United Kingdom that its corporations were United Kingdom subjects."); *see also Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). The reasoning of the court in *Southern Cross* shows an appreciation of the proper balance between the Executive and the Judiciary in this area: by deferring to the Executive Branch, one avoids the conflict present in this case where the United States recognizes the United Kingdom as the sovereign over the British Virgin Islands, but the Second Circuit does not.

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23. Like the United Kingdom, the United States has submitted *amicus* briefs to this Court in support of Chase at both the petition for a writ of certiorari stage and on the merits. Additionally, the United States submitted an *amicus curiae* brief to the Second Circuit in the *Matimak* matter (*see Matimak*, 118 F.3d at 86 (noting Department of Justice's position), to the Fifth Circuit in the *ART 57 Properties, Inc.* matter (*see* L 37-63) and to the Third Circuit in the *Southern Cross Overseas Agencies, Inc.* matter (*see* 181 F.3d at 417 (noting the State Department's brief)).

Although *Matimak* has only been applied to territories of the United Kingdom, there are other nations which also have overseas territories that would be potentially subject to the same restriction on alienage jurisdiction set forth in *Matimak*.[24] One district court in the Second Circuit has recognized that the argument may be extended to corporations and residents of Aruba, which is a Dutch dependency. *Inarco Int'l. Bank N.V. v. Lazard Freres & Co.*, No. 97 Civ. 0378(DAB), 1998 WL 427618 at *1-2 (S.D.N.Y. July 29, 1998) (recognizing that defendant sought to dismiss an Aruban bank's complaint because Aruba was a Dutch dependency, but then dismissing complaint on another jurisdictional bases). It is very likely that the United States Department of State would receive similar protests from other nations, as the residents and corporations from these other nations' territories are deemed "stateless".

By declaring that the residents and corporations from the United Kingdom Overseas Territories are "stateless", the *Matimak* decision and its progeny, including the Second Circuit's decision in this case, have clearly offended the United Kingdom and jeopardized its relations with the United States. Although the *Matimak* court claimed there was no sovereign to offend (118 F.3d at 87), the position of the United Kingdom in this case shows that the *Matimak* court was clearly in error.

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24. These nations, which also have overseas territories, include France, the Netherlands, Australia, New Zealand, Denmark and Norway. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, at 9 n.3.

B. The Matimak Line of Decisions Adversely Impacts Commerce

The economic impact of shutting out United Kingdom Overseas Territories residents and corporations from federal court should not be underestimated. The United Kingdom Overseas Territories, like the British Virgin Islands, are emerging economic and financial centers. Because of favorable tax and corporate law, the Overseas Territories have been referred to as "the international equivalent of Delaware or Nevada." *Southern Cross Overseas Agencies*, 181 F.3d at 416.

For example, almost 500,000 international business companies have been incorporated in the British Virgin Islands since 1984. *See* AMS Group, *British Virgin Islands: More Than Just IBC's*, AMS Group Offshore Update Newsletter (July 2000), *available at* http://www.amsbvi.com/I49BVImorethanibcs.htm. Each of these companies, by statute, is required to conduct its business outside the British Virgin Islands (except professional contacts with lawyers, accountants, trust companies or investment advisors), so they are all cross-border or multinational corporations. British Virgin Islands International Business Companies Act § 5(1). The Cayman Islands, which has incorporated more than 40,000 companies, includes almost 600 banks and trust companies, with assets exceeding $500 billion.[25] *See* Central Intelligence Agency, *The World Factbook: Cayman Islands* (2001), *available at* http:/www.cia.gov/cia/publications/factbook/geos/cj.html. In a recent estimate, Bermuda was

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25. The Cayman Islands has been referred to as the world's fifth largest banking center. Suzanne Attewell, *Find Your Very Own Island in the Sun*, Sunday Times (London), February 10, 2002, features section.

stated to be the home of 1,400 insurance companies and 6,824 business companies.[26] (L 26).

Rather than promote economic investment and trade between the United States and these emerging financial centers, *Matimak* (and any extension of *Matimak*) adversely affects it. There is no doubt that under *Matimak*, a considerable number of foreign entities and individuals are deprived of an opportunity to have their claims heard in federal courts. Even today, foreign entities and individuals still are leery, as the Framers pointed out, of possible partiality on the part of the state courts. *See* Johnson, *supra*, at 33 ("Many foreign corporations and business associations have fears similar to those of their British predecessors."). The Oct. 2001 Diplomatic Note from the United Kingdom explicitly notes the adverse economic impact:

> The United Kingdom wishes to restate its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of the United States Federal Courts under 28 U.S.C. § 1332(a)(2), whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship between the United States and the United Kingdom Overseas Territories.

Oct. 2001 Diplomatic Note, *supra*, at 1-2.

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26. The Turks and Caicos Islands, another United Kingdom Overseas Territory, was also estimated to have incorporated 1911 insurance companies and 11,000 business companies. (L 26).

Although the United Kingdom Overseas Territories are becoming large economic and financial centers, if companies from these territories are unable to avail themselves of alienage jurisdiction and a federal forum, such companies may be less willing to do business in the United States. This is especially problematic when one considers that many commercial contracts and financial instruments, like the Indenture in this case, call for a forum in New York, traditionally the financial center of the United States. Petitioner is trustee under numerous sophisticated debt indentures collectively concerning billions of dollars, which contain consent to jurisdiction clauses similar to the one at issue here, signed by United Kingdom Overseas Corporations as part of major debt offerings issued in this country. Corporations and residents from the United Kingdom Overseas Territories, knowing they cannot avail themselves of the stability and certainty of a federal forum, will be less willing to do business in and with the United States. Moreover, the United States financial institutions who invest billions of dollars in such overseas territories companies will also be reluctant to invest in such entities if they cannot avail themselves of the stability, certainty and uniformity of a federal forum. Such a result further defeats the purposes behind alienage jurisdiction.

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In sum, while the *Matimak* court properly recognized the need for deference in the interpretation of foreign law and properly identified one of the purposes of alienage jurisdiction (*i.e.*, avoiding foreign policy entanglements), the *Matimak* court reached a conclusion that is simply wrong. The *Matimak* court, without the benefit of the United Kingdom's authoritative briefing, completely

misinterpreted the law of the United Kingdom. Through this misinterpretation, the *Matimak* court created an entanglement with "a strong ally [and] the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago." *Koehler*, 229 F.3d at 189 (Sotomayor, J., dissenting). The *Matimak* decision in its rush to render residents of United Kingdom Overseas Territories "stateless" has "given rise to precisely the sort of damage to foreign relations the statute was meant to avoid." *Id.*

In this case, the Second Circuit has inexcusably compounded its error in *Matimak* by refusing to look at any of the indicia that clearly demonstrate that residents and corporations from the British Virgin Islands are under the sovereignty of the United Kingdom or to accord any weight to the position of the United States in this matter. A review of the Constitution of the British Virgin Islands shows that the United Kingdom retains full sovereignty over the islands, remains responsible for core government functions, and has the right to review all laws passed by a legislature that has sworn its allegiance to the United Kingdom. In light of the foregoing, as Judge Sotomayor has pointed out, "[t]he people of Bermuda [and the other United Kingdom Overseas Territories] would undoubtedly be surprised to learn that they are 'stateless.'" *Id.* at 188. This is especially true for the British Virgin Islands, whose own Attorney General has opined that the residents and corporations are subjects of the United Kingdom. (L 35-36). Defining millions of people and corporations from the United Kingdom's (and other nation's) territories as "stateless" contradicts basic notions of western jurisprudence, violates the intent of the Framers of the Constitution, and unsettles an area of law which has been applied without incident for two centuries.

CONCLUSION

For all the reasons set forth herein, the decision of the United States Court of Appeals for the Second Circuit should be reversed, and the matter remanded to the Second Circuit for a decision on the merits of Traffic Stream's appeal.

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Respectfully submitted,

SARAH L. REID
Counsel of Record
JOSEPH N. FROEHLICH
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, New York 10178
(212) 808-7800

EDWARD H. TILLINGHAST, III
COUDERT BROTHERS LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 626-4400

Attorneys for Petitioner